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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

FE CASTRO MARCHISHECK,

Petitioner,

vs.

SAN MATEO COUNTY, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

First, whether the provisions of the Family and Medical Leave Act (FMLA), 29 U.S.C. § 2613 (regarding employer requested medical certifications) apply to employee volunteered medical certifications, and if so, whether the procedures of section 2613 are the exclusive means to question the employee volunteered certification, and that failure to do so prevents the employer from later questioning whether the employee (or employee's family member) had a serious health condition.

Second, whether the Court should allow a broad interpretation of "serious health condition" that allows for a combination of ailments to qualify as a serious health condition and, further, broadly interpret the provision of "treatment" under the statute.

Third, whether the courts should be limited to questioning "care" under the statute to the time the employee actually takes leave.

Fourth, whether the FMLA fails to adequately protect workers by improperly shifting the burden of identifying FMLA leave to the employee.

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OPINIONS BELOW

The judgment and order of the United States District Court, Northern District of California granting summary judgment to defendant San Mateo County are set forth in the Appendix, pages 28 and 30 respectively. The decision of the United States Court of Appeals, Ninth Circuit is set forth in the Appendix, page 1, and is reported in 199 F.3d 1068 (9th Cir. 1999). The denial of the petition for rehearing is set forth in the Appendix page 30.

JURISDICTION

On June 4, 1998 the United States District Court for the Northern District of California granted summary judgment to defendant, County of San Mateo. App. 26. Plaintiff Fe Marchisheck filed a timely appeal. The United States Court of Appeals for the Ninth Circuit entered its opinion on December 16, 1999. App. 1. Petition for rehearing was denied on January 12, 2000. App. 30. This petition was timely filed within 90 days of the denial for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1).

FEDERAL PROVISIONS AND STATUTES INVOLVED

The Family and Medical Leave Act, title 29 United States Code sections 2601, 2612, 2613 and implementing regulations 29 Code of Federal Regulations sections

825.114, 825.116, 825.208, 825.301, 825.303, 825.305, 825.307, which are reprinted in the Appendix starting on page 31.

STATEMENT OF THE CASE

This case involves the interpretation of certain provisions of the Family and Medical Leave Act (FMLA). In certain instances, employees requesting FMLA leave may be required to provide medical certification in support of their leave. *See* 29 U.S.C. § 2613; App. 37. The first question presented is whether the provisions of 29 U.S.C. § 2613 apply to employee-volunteered medical certifications, and if so, whether the procedures of section 2613 are the exclusive means to question the employee-volunteered certification, and that an employer's failure to do so results in it being estopped from later questioning the existence of a "serious health condition." Further, the Court is asked to review the lower court's interpretation of a "serious health condition," "treatment" and "care" under the FMLA. Finally, the Court is asked to clarify the employer's obligation to identify leave as FMLA-qualifying and the employee's obligation to provide employer with sufficient information to trigger an FMLA inquiry.

The questions arise out of Petitioner Fe Marchisheck's attempt to exercise her rights under the FMLA. The FMLA allows employees up to twelve weeks of unpaid leave, for, *inter alia*, the care of an employee's spouse, child or parent who is suffering from a "serious health condition." 29 U.S.C. § 2612(a)(1)(C); App. 33. Ms. Marchisheck, a 58-year-old single parent, a United States citizen though a native of the Philippines, and 26-year

employee of San Mateo County, attempted to take emergency medical leave when her son's mounting behavioral disorders, for which he had been having ongoing treatment, culminated in a physical assault that required emergency room treatment. Excerpts of Record 206-211, 213, 220. (Hereinafter "ER"). Ms. Marchisheck's son also discussed this assault at a prescheduled counseling appointment at Kaiser Permanente. ER 491. Ms. Marchisheck requested emergency leave in order to care for Shaun by spending time with him as prescribed by a psychiatrist and removing him to the Philippines to ensure his health and well-being. ER 615. She presented her employer with a note from the physician who was a member of her son's health care team at Kaiser Permanente, her health maintenance organization. ER 623, 624. The note explained that her son was in treatment at Kaiser, that the treatment required his removal to the Philippines, and that Ms. Marchisheck needed to accompany him to arrange for his care in the Philippines. ER 615. Without questioning the note from the doctor, Ms. Marchisheck's employer, Respondent San Mateo County, denied her leave and terminated her employment after she took the leave. ER 160, 634. Nearly seven months later, after Ms. Marchisheck filed her FMLA claim, her former employer requested from her FMLA certification, by presenting a form used under the California Family Rights Act (CFRA). ER 1119, 1120. Ms. Marchisheck contends that because San Mateo County failed to question the adequacy of her note at the time she initially gave it to them, they are now estopped from claiming that the note was insufficient to establish a serious health condition.

The district court granted summary judgment to San Mateo County. App. 26. Ms. Marchisheck appealed to the Ninth Circuit. The Ninth Circuit held that the doctor's note that Ms. Marchisheck volunteered did not meet the requirements for medical certification under the FMLA and did not establish that Ms. Marchisheck's son had a serious health condition. App. 13, 18. The court also held that neither the procuring of the note nor the pre-scheduled visit with the counselor constituted "treatment" under the Department of Labor regulations. App. 13. Further, the court held that Ms. Marchisheck's taking her son to the Philippines did not constitute "caring for" under the statute. App. 16. The Ninth Circuit denied a request for rehearing. App. 30.

REASONS FOR GRANTING WRIT

The present outcome of this case, which involves interpretation of the Family and Medical Leave Act (FMLA), is significant because the appellate courts' interpretations of the statute affect the rights of thousands of workers. Although the FMLA sets out provisions for employer-requested medical certification, it is silent as to employee-volunteered certifications. Further, the Ninth Circuit decision here may contradict the primary purpose of the statute, which is "to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity." 29 U.S.C. § 2601(b)(1); App. 32. By granting this petition, the Court could clarify the obligations of employers to ask for proper medical certification from employees and

expand the protection of workers as intended under the statute.

MEDICAL CERTIFICATION

The FMLA is enacted to allow employees leave to enable them to, among others, care for certain family members who have serious health conditions. 29 U.S.C. § 2612(a)(1)(C); App. 33. When employees ask for leave to care for the serious health condition of these specified family members, employers may ask that the employee provide a medical certification in support of the employee's leave. 29 U.S.C. § 2613(a); App. 37-38. In any case where the employer has reason to doubt the validity of the medical certification provided, the employer may require another certification (hereinafter referred to as "recertification") from a different health care provider. 29 U.S.C. § 2613(c); App. 39. If the opinion in the recertification is different from the opinion in the original certification, the employer may request that the employee obtain another certification containing the opinion of a third health care provider, which opinion will be binding on both the employer and the employee. 29 U.S.C. § 2613(d); App. 40.

However, under the statute, the above provisions only apply if the employer requests a medical certification from the employee. *See* 29 U.S.C. § 2613; App. 37. There is no requirement in the FMLA that an employee needs to provide a medical certification first in order to get an FMLA leave, unless the employer requests one. *See* 29 U.S.C. §§ 2612, 2613; 29 C.F.R. 825.305(a); App. 33-38,

56; *Pendarvis v. Xerox Corp.*, 3 F.Supp.2d 53, 56 (D.D.C. 1998). The statute is therefore silent when the employee volunteers a medical certification. *See* 29 U.S.C. § 2613; 29 C.F.R. 825.305(a); App. 37-38, 56.

In *Marchisheck*, the Ninth Circuit equated the employee-volunteered doctor's note with an employer-requested medical certification, stating that Marchisheck's note did not comply with the certification requirements of 29 U.S.C. § 2613(b). *Marchisheck*, 199 F.3d at 1077; App. 38. But, the sufficiency requirements of 29 U.S.C. § 2613(b) only specifically apply to section 2613(a), employer-requested medical certifications, not to employee-volunteered certifications. 29 U.S.C. § 2613(b) (stating that "[c]ertification provided under subsection (a) shall be sufficient if it states . . . "). App. 38. Employees, when requested by an employer to provide a medical certification, know what constitutes a sufficient certification because they are told specifically what is required (29 C.F.R. §§ 825.305(a); 825.301(b)(1)(ii)) and are advised of the consequences of the failure to provide adequate certification (29 C.F.R. §§ 825.305(d); 825.301(b)(2)). App. 37-38. This is not true with employee-volunteered certifications. Thus, this case underscores the need for the Court to provide guidance to the lower courts in the absence of statutory and regulatory direction. If there is no requirement for employees to furnish a medical certification before getting medical leave (unless the employer asks for one), when an employee voluntarily provides one, the employee may be getting punished and afforded less FMLA protection than employees who do not, when courts equate volunteered

certifications with employer-requested certifications.[1] Other courts have also treated employee-volunteered certifications as if they were employer-requested certifications. In *Price v. City of Fort Wayne*, 117 F.3d 1022, 1025 (7th Cir. 1997), the employee filled out the employer's leave request form and attached a doctor's note requiring her to take time off. The Seventh Circuit applied the provisions of 29 U.S.C. § 2613 even though the note was employee-volunteered and not employer-requested. *See Price*, 117 F.3d at 1026-27.[2] If, then, employee-volunteered medical certifications are treated as employer-requested certifications, is the three-step process (certification, recertification, and third certification) of section 2613 the *exclusive* procedure that deals with certifications, and if so, is the employer's failure to request a recertification – if it had doubts about the validity of the volunteered certification – ground to prevent the employer from later challenging whether the employee had a serious health condition?

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[1] *See also Kinchelow v. Robinson Property Group*, 1998 WL 180316 (N.D. Miss. 1998). In *Kinchelow*, the employee voluntarily submitted a sheet signed by a physician entitled "After Care Instructions" which indicated that the employee was suffering from back and neck injuries and that she should be excused for a certain period of time. *Kinchelow*, 1998 WL 180318 at *1. The court equated this with an employer-required certification and held that the employee cannot maintain a viable claim under the FMLA because the employee failed to provide the employer with an adequate certification under 29 U.S.C. § 2613(b). *Id.* at *2.

[2] *See also Diaz v. Fort Wayne Foundry Corp.*, 131 F.3d 711, 713 (7th Cir. 1997) (applying the provisions of section 2613 even though the employee initially volunteered a doctor's note).

There is evidence that the section 2613 statutory scheme is designed to have the medical determinations made by health care providers rather than by the courts. *See Sims v. Alameda-Contra Costa Transit Dist.*, 2 F.Supp.2d 1253, 1261. In responding to comments regarding the interim FMLA regulations adopted by the Department of Labor (DOL), the DOL explained that employers are not to make the medical judgments as to whether a particular medical condition is a serious health condition justifying leave under the Act:

> Employers may not substitute their personal judgments for the test in the regulations or the medical opinions of the health care providers of employees . . . to determine whether an employee is entitled to FMLA leave for a serious health condition.

60 Fed.Reg. 2180, 2235 (1995).

Congress designed the certification procedures of section 2613 "as a check against employee abuse of [medical] leave." H.R.Rep. No. 103-8(I), 103d Cong., 1st Sess. at 39 (1993); S.Rep. 103-3, 103d Cong., 1st Sess. at 27-28 (1993). These procedures allow the employer to obtain second and third medical opinions to protect against employee abuse by enabling the employer to ensure that the employee really needs time off. In this case, the employer, Respondent San Mateo County, had an opportunity to question the adequacy of the initial certification provided by Ms. Marchisheck, but it did not do so. When San Mateo County failed to follow the procedures set forth by section 2613 regarding medical certifications, it should now be estopped from challenging whether Ms. Marchisheck's son had a serious health condition.

Thus, the Court should grant the petition in order to provide guidance to the lower courts whether to treat employee-volunteered medical certifications the same way as employer-requested certifications, or whether in some ways, but not all, the provisions of section 2613 amount to the exclusive procedure that deals with certifications, and that failure of the employer to follow the statutory scheme and ask for recertification creates an estoppel that prevents the employer from later questioning whether the employee or employee's family member has a serious health condition.

SERIOUS HEALTH CONDITION AND TREATMENT

The FMLA is a remedial statute, and as such should be construed broadly. *Hodgens v. General Dynamics Corp.*, 144 F.3d 151, 163 (1st Cir. 1998). Congressional intent also demands a broad reading of the statute. The Senate recognized the changing face of the workforce and the dilemma faced by families trying to balance the demands of work and home. *See* S. Rep. No. 103-3 at 6 (1993). The Senate stated that the FMLA "accommodates the important societal interest in assisting families by establishing a minimum labor standard for leave." S. Rep. No. 103-3 at 6. The Senate specifically addressed the societal reality of women returning to the workforce, the high percentage of mothers that currently work, and the increase in single parent families. S. Rep. 103-3 at 7, 8. Eleanor Holmes Norton testified that

> [I]t is hard to understand how single parents, who have no choice but to work to support their families, have survived under the present

> system. For this highly vulnerable group . . . a job guarantee for periods when they or their children have serious health conditions is urgently necessary. The high rates of single parenthood among minority families and of labor force participation by minority single mothers make job-guaranteed leaves especially critical for minorities.

Id. at 14. These concerns are not merely the rhetoric of congressional intent, but are reflected in the findings and purpose of the statute. *See* 29 U.S.C. § 2601; App. 31.

The lower courts then, in interpreting the provisions of the statute, must take into consideration both the remedial nature of the statute and the express congressional intent, as evidenced by both the congressional record and the statute itself. Courts violate these principles to the extent that they narrowly interpret the FMLA provisions.

a. Serious Health Condition

"Serious health condition" is defined as either inpatient care or a condition involving "[c]ontinuing treatment by a health care provider." 29 C.F.R. § 825.114(a)(1), (2); App. 40-42. In order to qualify as a serious health condition involving continuing treatment, there must be "[a] period of incapacity . . . of more than three consecutive calendar days" and either two or more treatments by a health care provider or one treatment that "results in a regimen of continuing treatment under the supervision of a health care provider." 29 C.F.R. § 825.114(i)(A)(B); App. 41.

Thus, the question presented is whether the Ninth Circuit is remiss in ignoring these principles in its failure to properly extend the Seventh Circuit's holding in *Price v. City of Fort Wayne*, 117 F.3d 1022 (7th Cir. 1997). The *Price* court held that several ailments, which individually are not serious health conditions, may collectively be serious enough to constitute a "serious health condition." *Id.* at 1024, 1025. Although the Ninth Circuit did not explicitly repudiate the reasoning in *Price*, its failure to apply the reasoning in *Price* to the facts of *Marchisheck* constitutes a split between the Seventh Circuit and Ninth Circuit. In *Marchisheck*, the Ninth Circuit ignored the evidence that would have supported an extension of *Price*, which would lead to protection of more workers under the FMLA. In *Marchisheck*, the Ninth Circuit considered as incompetent evidence that Shaun Marchisheck suffered from post-traumatic stress disorder and parent-child relationship problems, among other diagnoses by Project Concern and other psychologists and psychiatrists. App. 12; App. 14, 15; ER 327-349; 1125-1138. Although Shaun Marchisheck had undergone treatment at both Project Concern and at Kaiser's psychiatry department, and continued to be a Kaiser psychiatry patient, the court discounted this psychological treatment, and failed to see that this condition, combined with the beating and emergency room treatment for the beating, amounted to a serious health condition. App. 15. So, despite its language affirming *Price*, the Ninth Circuit in fact did not apply the *Price* analysis to the facts of *Marchisheck*.

b. Treatment

Further, in *Marchisheck*, did the Ninth Circuit fail to properly understand what constitutes "treatment" in assessing whether a child has a "serious health condition"? The court rejected the argument that a doctor's note prescribing ongoing treatment constituted "treatment" under the regulations. *Marchisheck v. San Mateo Co.*, 199 F.3d 1068, 1075 (9th Cir. 1999); App. 13. The court also rejected as "treatment" Marchisheck's son's prescheduled August 9, 1995 visit with Jerry Lawler, a psychological assistant at Kaiser, as well as the prescribed time Marchisheck was to spend with her ill son for the weeks following August 17, 1995. App. 13. The court acknowledged that treatment is "loosely defined" under the Department of Labor's implementing rules, which state that "[t]reatment . . . includes (*but is not limited to*) examinations to determine if a serious health condition exists and evaluations of the condition." *Id.* at 1075; App. 13, citing 29 C.F.R. § 825.114(b), emphasis added. And, at least one district court case has held that a visit to a doctor to procure a note for an employee does not preclude the visit as "treatment" under the statute. *See Stubl v. T.A. Systems, Inc.*, 994 F.Supp. 1075, 1088 (E.D.Mich. 1997) (holding that, although the plaintiff's "primary purpose" for visiting the doctor was to get a note for his insurer, the visit was "treatment" because the doctor evaluated and diagnosed the plaintiff). The court nevertheless constructed the statute in a manner that disregards the Department of Labor's loose definition, the congressional intent of protecting workers, especially minority single

parents, and the remedial nature of the statute, all of which point to a liberal interpretation of the statute.

CARING FOR

The provision of "caring for" under the FMLA regulations expressly "encompasses both physical and psychological care" of family members. 29 C.F.R. § 825.116; App. 44. Again, the court in *Marchisheck* notes that the rule includes "providing psychological comfort and reassurance which would be beneficial to a child, spouse or parent with a serious health condition who is receiving inpatient or home care." *Marchisheck*, 199 F.3d 1068 at 1075; App. 16, citing 29 C.F.R. § 825.116(a). Nevertheless, it holds that taking Marchisheck's son to the Philippines does not constitute care under the statute. App. 16. It also failed to address whether the time Ms. Marchisheck spent with her ill son was treatment as prescribed by Dr. Solomon. The question is what the court should look at when evaluating "care." Should it look at what the employee did during the leave, or as the Ninth Circuit did here, look to what happened to the employee's son after the employee returned from the leave?

NOTICE

The appellate circuits are clear in their understanding that when employees request emergency leave under the FMLA the employer has the responsibility to designate the leave as FMLA qualifying. *See Manuel v. Westlake Polymers Corp.*, 66 F.3d 758, 762 (5th Cir. 1995). Further, if

there is ambiguity as to whether the leave is FMLA qualifying, the employer has the obligation of requesting clarifying information from the employee. *Id.*

The appeals courts, however, are unclear on what this affirmative obligation of the employer to request more information entails. Employers have not had established guidelines regarding their obligation to inform employees of either the requirements for FMLA medical certification or of the sufficiency of information necessary to trigger an inquiry into FMLA leave. The lower courts' lack of clarity on this issue has deprived employees of their rights under the FMLA by improperly shifting to employees the burden of identifying the leave as FMLA qualifying. This improper shift in burden may foreclose an employee's opportunity to file an FMLA claim, defeating the remedial intent of the statute.

Both the FMLA regulations and case law place the burden of identifying unforeseeable FMLA leave squarely on the employer. *See* 29 C.F.R. § 825.208(a); App. 45. *See also Manuel*, 66 F.3d 758 at 762. Indeed, both the regulations and case law make clear that employees need not expressly invoke the FMLA when taking unforeseeable leave. *See* 29 U.S.C. § 825.303(b); *see also Manuel*, 66 F.3d at 762. The FMLA falls into the category of laws promulgated to promote health and safety or benefit workers; as such, the law should not require the intended beneficiaries to hire a lawyer in order to avail themselves of the benefits. *See id.*

Therefore, employees need only give enough information to trigger an inquiry from the employer as to whether the requested leave is FMLA qualifying. *See*

Price, 117 F.3d at 1025-1026. The employer then has the obligation to identify the leave as possibly FMLA qualifying and to request through informal means any additional information necessary to confirm FMLA eligibility. *Id.*

The provisions for proper FMLA certification were also intended to protect workers' rights and balance the rights of workers and employers. *See Satterfield v. Wal-Mart Stores, Inc.*, 135 F.3d 973, 975 (5th Cir. 1998). Once possible FMLA leave has been identified, the employer may request that the employee furnish certification of the medical condition. *See* 29 C.F.R. § 825.305(a); App. 56. Once the employee has provided certification, the employer may challenge the sufficiency or veracity of the certification by requesting a second opinion at the employer's expense. *See* 29 C.F.R. § 825.307(2); App. 61.

Although intended to protect workers, this provision, as interpreted by the appellate courts, coupled with the requirements that employees give sufficient information to trigger an inquiry into FMLA eligibility, improperly shifts the burden of identifying FMLA leave back onto the employee. If employees do not know the specifics of the law, or even the existence of the law, legitimate FMLA claims may be denied for failing to provide sufficient information to the employer about the nature of the leave. Without knowledge that leave is FMLA qualifying, employees may not provide the employer with certification sufficient to trigger their rights under the FMLA. Thus, courts have used against workers the very provisions intended to protect workers.

For example, in *Carter v. Ford Motor Co.*, 121 F.3d 1146 (8th Cir. 1997), Carter's doctor diagnosed him with depression and anxiety disorder, and attested that Carter was totally disabled. *Id.* at 1147. Although Carter informed his employer that he was sick, his employer fired him before making a thorough FMLA inquiry. *Id.* The Eighth Circuit upheld the lower court's granting of summary judgment to Ford, saying Carter's notice was not adequate or timely under the FMLA. *Id.* at 1148.

In a Fifth Circuit case, the court upheld summary judgment for the employer when it found that the employee did not give sufficient notice. *See Satterfield*, 135 F.3d 973. In *Satterfield*, the plaintiff informed her employer about a number of health concerns that required her to take time off. *See id.* at 978. Again, the employer fired Satterfield before there was any FMLA inquiry. *See id.* at 979.

In *Marchisheck*, the court upheld summary judgment for the employer, distinguishing a lower court case in which the district court held that the employer was estopped from challenging a medical certification after it failed to request a second opinion. *Marchisheck*, 1099 F.3d at 1077; App. 19. In *Marchisheck*, the court held that the estoppel argument failed because the doctor's note originally provided by the employee failed to meet the minimum certification requirements. *Id.*; App. 18. The court then failed to properly identify Marchisheck's argument that San Mateo County had an obligation to inform her that her requested leave might be FMLA qualifying. *Id.* at 1078; App. 19. The court dismissed the claim, erroneously believing that Marchisheck was discussing the 30 day notice requirement for foreseeable leave. *Id.*; App. 19.

In all these cases, the courts have allowed employers to terminate employees who may have been FMLA eligible without first requiring an FMLA inquiry as mandated by both the statute and by FMLA case law that clearly place on the employer the burden of identifying FMLA leave.

The FMLA is a remedial statute, and as such should be interpreted broadly. *Hodgens*, 144 F.3d at 163. It is also among laws such as "child labor laws, minimum wage, Social Security, the safety and health laws, the pension and welfare benefit laws, and other labor laws that establish minimum standards of employment." Senate Report No. 103-3 Cong. Record vol. 139 p. 3 (1993). As such, it should follow that the burden on employers for notifying employees of their rights under the statute follows the laws with similar underlying policy considerations.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be granted.

Respectfully submitted,

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Fe Castro **MARCHISHECK**, Plaintiff-Appellant,

v.

SAN MATEO COUNTY and Does 1 through 10, Defendants-Appellees.

No. 98-16141.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Nov. 5, 1999.

Decided Dec. 16, 1999.

Crisostomo G. Ibarra, Law Offices of Crisostomo G. Ibarra, San Francisco, California, for the plaintiff-appellant.

A. Robert Singer and Craig P. Tanner, Hassard Bonnington, San Francisco, California, for the defendants-appellees.

Appeal from the United States District Court for the Northern District of California; Saundra B. Armstrong, District Judge, Presiding. D.C. No. CV-96- 04254-SBA.

Before: CANBY, HALL, and GRABER, Circuit Judges.

GRABER, Circuit Judge:

This appeal arises under the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. §§ 2601-2654, and the California Family Rights Act (CFRA), Cal. Gov't Code §§ 12945.1 to .2, 19702.3. Plaintiff Fe Castro Marchisheck contends that defendant San Mateo County violated those statutes when it terminated her employment after she took a one-month unauthorized leave from work to move her teenage son to the Philippines. The district court granted Defendant's motion for summary judgment. On

de novo review, *see Margolis v. Ryan*, 140 F.3d 850, 852 (9th Cir.1998), we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

We view the facts in the light most favorable to Plaintiff, the nonmoving party. *See id.* Plaintiff was employed as a senior medical technologist in the San Mateo County General Hospital. She has a son, Shaun. At the time of the key events in this case, Shaun was 14 years old. Plaintiff was raising him alone.

Shaun had received counseling beginning in 1991. Following a 1991 arrest for shoplifting, Shaun was counseled by Dr. Rath at Project Focys. Dr. Rath concluded that Shaun, then 10, was mildly depressed and had poor peer relations. Shaun received counseling at Kaiser in 1994. He had 10 counseling sessions in 1995 with Mariana Pavolotsky, an intern at Project Focys. Plaintiff, who was concerned about Shaun's grades and choice of friends, initiated those sessions. After the final session, on June 1, 1995, Pavolotsky did not refer Shaun for continued therapy. Her records from their sessions do not contain any diagnosis of a mental disorder, though they do reflect her concern with Shaun's behavioral problems. Dr. Rath, who was Pavolotsky's supervisor, stated in a deposition that he did not recollect "having a big serious concern at that point" about Shaun's behavior and also stated that, if Pavolotsky "felt like there was something gravely needing attention, then there would have been probably significant attempts to try to get him to continue in therapy."

Shaun also attended six counseling sessions with Jerry Lawler at Kaiser between June 2 and August 9,

1995. Lawler was a "psychological assistant" in the drug and alcohol abuse program at Kaiser. Plaintiff brought Shaun to Kaiser because she was concerned that he was abusing alcohol and drugs. Lawler came to a "provisional" conclusion during counseling that Plaintiff's concerns were unfounded. He diagnosed Shaun with a "parent-child relationship problem" but "ruled out" diagnoses of attention deficit disorder and post-traumatic stress disorder.

On the night of August 5, 1995, Shaun was assaulted by several acquaintances. Plaintiff took Shaun to the emergency room when she arrived home from work on August 6. The emergency room report states that Shaun lost consciousness during the attack and suffered a nasal contusion, two puncture burns on his back, abrasions, erythema on the right side of his neck, and a left lateral subconjunctival hemorrhage. The report also states that Shaun was "alert and oriented" and "feel[ing] remarkably well." He was sent home with instructions to apply ice to his nose, clean his wounds with soap and water, and return to the emergency room if his wounds became more red, swollen, or tender or if he developed a fever. The report does not recommend any restriction of Shaun's activities.

Concerned for Shaun's safety, Plaintiff took him to stay with his sister. Shaun stayed with his sister from August 7 to 17. According to his sister, Shaun was "lethargic," "jittery," and "in an obvious state of fear," and he "mostly laid on the couch" and did not shower or bathe.

On August 9, Shaun attended a previously scheduled counseling session with Lawler at Kaiser. Lawler noticed that Shaun had a black eye and asked him what happened. According to Lawler, Shaun "said 'I got into a ruckus' or something like that with somebody, but clearly he wanted it to be no big deal." Lawler stated that Shaun did not tell him of any physical problems from the assault, other than the black eye, that Lawler observed no such problems, and that Shaun expressed no fear for his safety but, "on the contrary," "minimized it."

Immediately after Shaun was assaulted, Plaintiff conceived a plan to move Shaun to the Philippines to live with her brother. Plaintiff was born in the Philippines; Shaun was not, although he had visited there. On August 10, Plaintiff made a written request for approximately five weeks of vacation leave, to begin on August 18. A supervisor, George Ford, denied the request, because he could not cover the shifts that Plaintiff would miss without authorizing overtime. Plaintiff's written request does not specify the reason for the vacation, but Plaintiff asserts that, when Ford denied her request, she told him that she had to go to the Philippines because of an "emergency" involving Shaun. That "emergency" was her fear for Shaun's safety; Plaintiff feared that if she left Shaun alone, he would be beaten or killed, and she believed that he would be safe from "getting beaten up again" if he moved to her brother's house in the Philippines.

Plaintiff had further discussions about her travel plans over the next week. Apparently Plaintiff already had bought airplane tickets, or was in the process of buying tickets, when she requested vacation leave on

August 10. She spoke with another supervisor, Elaine Phelps, on August 11. Phelps, who had heard that Plaintiff already had tickets, warned Plaintiff not to leave without approval. On August 16, Ford left a message on Plaintiff's answering machine, reminding her that her request had been denied.

On August 17, the day on which she was scheduled to leave for the Philippines, Plaintiff met with Ford, Phelps, and Lola Thompson, the Assistant Administrator of the hospital, to discuss her vacation request. That morning, before the meeting, she called Kaiser in the hope of obtaining a letter from a doctor supporting her request for leave. Plaintiff spoke to a psychiatrist, Dr. Solomon. Plaintiff had not met Solomon, and Solomon had not been involved in any way in Shaun's counseling. Plaintiff approached him as follows: "I said [to] Dr. Solomon, I said, 'I have a son, Shaun Marchisheck, that Dr. Lawler had seen, and I would like to take my son to the Philippines, to look for a school and, you know, look for a school and housing facilities.' So I said 'If you could kind of help me out because I am having a hard time getting time off.' "

Solomon, whose practice focused on adult patients and who had limited experience treating adolescents, consulted Shaun's chart and agreed to write a letter. In his deposition, Solomon displayed almost no recollection of his contact with Plaintiff. He apparently spoke briefly with two doctors who had been involved with Shaun, but stated that he had little "participation" in their conversation about Shaun. He believed at the time that Plaintiff intended to stay in the Philippines with Shaun. In any event, he dictated the following letter for Plaintiff:

> Fe Marchisheck's son Shawn [sic] is under treatment here in our department, and at this point it is necessary for his continued treatment for him to move back to the Philippines for a time. It is also necessary for his mother to accompany him to arrange housing, schooling, etc. I would therefore greatly appreciate it if you could help in excusing her from work during this time for this family medical crisis.

Although the letter mentions "continued treatment," Solomon had "no information" about any treatment that Shaun would receive in the Philippines; nor could he have, as Plaintiff admitted in her deposition that she had no plans for Shaun to see any kind of doctor after he moved overseas. Solomon also stated that he was not sure what he was referring to when he described a "family medical crisis" and that he did not recall whether he actually had drafted the letter himself.

Plaintiff presented Solomon's letter at her August 17 meeting with Ford, Phelps, and Thompson. Despite the letter, Plaintiff's request for leave was denied. However, Plaintiff was given two other options: Taking five weeks off at the end of September, or taking two weeks off after Labor Day. Plaintiff rejected those options, in part because she already had purchased airplane tickets and could not afford to purchase new tickets. Plaintiff took Shaun to the Philippines that night.

On September 7, Ford sent Plaintiff a letter expressing Defendant's intent to terminate Plaintiff on September 20, for insubordination and absence without leave. In that letter, Plaintiff was given the opportunity to respond to the statements in the letter, either orally or in writing.

She did so in a September 21 meeting before Paz Beegle, Director of Psychiatric Emergency Services. At that meeting, Plaintiff was represented by union representative Nadia Bledsoe. After the meeting, Beegle issued a document stating that the disciplinary action against Plaintiff was proper.

Defendant fired Plaintiff by letter on September 22. In that letter, Defendant noted that Plaintiff had 14 days to appeal her termination.

Plaintiff's union filed a grievance on her behalf on October 3, 1995. On November 14, Plaintiff met with her union representative, Bledsoe, and an AFSCME union lawyer, Joseph Colton, to discuss her case. Colton concluded that Plaintiff did not have grounds for a grievance, but suggested that she speak to someone at the United States Department of Labor about whether there were grounds to charge Defendant with violating the FMLA. On December 11, Plaintiff and Bledsoe met with Dante De Tablan, an investigator with the Department of Labor's Wage and Hour Division. After reviewing Plaintiff's case, De Tablan concluded that there were not sufficient grounds to charge Defendant with violating the FMLA. At that point, Bledsoe concluded that there was an insufficient basis for Plaintiff's grievance and informed Plaintiff that the union no longer would represent her.

On February 6, 1996, Plaintiff, who by then was represented by counsel, requested an appeal before the Civil Service Commission. That request was denied because it was untimely.

Plaintiff then filed an FMLA/CFRA claim with the San Mateo County Board of Supervisors on March 6, 1996. County counsel requested a Medical Certification regarding Shaun's alleged "serious health condition" and provided Plaintiff's counsel with a copy of the California Medical Certification form. Plaintiff did not reply and never returned the form. On May 24, 1996, the Board of Commissioners rejected Plaintiff's claim.

Plaintiff filed a complaint in district court on November 26, 1996, alleging five claims for relief. Two of those claims were under the FMLA, two were under the CFRA, and one alleged "Termination in violation of Public Policy." All turned on Plaintiff's underlying assertion that she was entitled to take leave under the FMLA and CFRA to "care for" Shaun, who was suffering from a "serious health condition."

The parties filed cross-motions for summary judgment. The district court granted Defendant's motion on the ground that "the undisputed evidence establishes that, during the time period at issue in this case, Plaintiff's son, Shaun, did not have a serious medical condition which would allow Plaintiff to claim the protections of the FMLA and the CFRA." Plaintiff brought this timely appeal.

DISCUSSION

A. General Statutory and Regulatory Requirements

Plaintiff contends that she was discharged in violation of the FMLA and the CFRA, because she was entitled to take leave to "care for" Shaun, who was suffering from

a "serious health condition."[1] The FMLA entitles employees to take 12 weeks off from work, without pay, "[i]n order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition." 29 U.S.C. § 2612(a)(1)(C) (emphasis added). The CFRA contains a parallel provision. *See* Cal. Gov't Code § 12945.2(c)(3)(B).[2]

The FMLA defines a "serious health condition" as an illness, injury, impairment, or physical or mental condition that involves –

> (A) inpatient care in a hospital, hospice, or residential medical care facility; or
>
> (B) continuing treatment by a health care provider.

29 U.S.C. § 2611(11). Shaun did not receive inpatient care; if he had a "serious health condition," it was because he

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[1] The issue in this case pertains to Shaun's condition at the time Plaintiff requested leave. Plaintiff provides us with a number of doctors' reports that, she argues, support her view of this case. Some of those reports were presented to the district court in a timely manner; others, however, were untimely and are not part of the summary judgment record. Some discuss Shaun's condition in August 1995; some discuss his condition at other times. We decline to consider reports that are not part of the summary judgment record and reports that do not purport to discuss Shaun's condition during the relevant period.

[2] Plaintiff's CFRA claims turn on the FMLA's definitions of "serious health condition" and "care for." The CFRA incorporates those definitions by reference, see Cal.Code Regs., tit. 2, § 7297.0, and Plaintiff makes no separate argument under the CFRA. Accordingly, we address Plaintiff's FMLA and CFRA claims together.

had a condition that involved "continuing treatment by a health care provider" under 29 U.S.C. § 2611(11)(B).

The requirements for a condition that involves "continuing treatment by a health care provider" are set out in the Department of Labor's rules implementing the FMLA.[3] Broadly speaking, and with exceptions that do

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[3] The relevant rule, 29 C.F.R. § 825.114, provides in part:

> (a) For purposes of FMLA, "serious health condition" entitling an employee to FMLA leave means an illness, injury, impairment, or physical or mental condition that involves:
>
> . . . .
>
> (2) Continuing treatment by a health care provider. A serious health condition involving continuing treatment by a health care provider includes any one or more of the following:
>
> (i) A period of incapacity (i.e., inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom) of more than three consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:
>
> (A) Treatment two or more times by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider; or
>
> (B) Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider.

not apply here, those rules require either (1) a period of incapacity of at least three consecutive days and (2) treatment two or more times by a health care provider, see 29 C.F.R. § 825.114(a)(2)(i); or (1) a "chronic serious health condition" (2) that results in a period of incapacity. 29 C.F.R. § 825.114(a)(2)(iii) (emphasis added). The rules define "incapacity" as "inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom." 29 C.F.R. § 825.114(a)(2)(i) (emphasis added).

B. "Serious Health Condition"

Plaintiff does not identify clearly what "serious health condition" she contends was the one that prompted her to take Shaun to the Philippines. She appears to suggest three such conditions: The injuries

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(ii) Any period of incapacity due to pregnancy, or for prenatal care.

(iii) Any period of incapacity or treatment for such incapacity due to a chronic serious health condition. A chronic serious health condition is one which:

(A) Requires periodic visits for treatment by a health care provider, or by a nurse or physician's assistant under direct supervision of a health care provider; (B) Continues over an extended period of time (including recurring episodes of a single underlying condition); and

(C) May cause episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy, etc.).

(Italicization omitted.)

from the August 5 beating, Shaun's chronic behavioral problems, and Shaun's "combined psychological and physical condition." On this record, none qualifies as a "serious health condition" under the FMLA and the relevant administrative rules.

First, the injuries from the beating did not constitute a "serious health condition." The parties disagree as to whether those injuries "incapacitated" Shaun for more than three consecutive days, as required by 29 C.F.R. § 825.114(a)(2)(i). However, Shaun's March 1998 declaration states: "I just did not and could not do anything for four or five days after August 5 [,1995]." Notwithstanding the stronger evidence to the contrary, his declaration creates a disputed issue of fact and precludes summary judgment on the issue of "incapacity."

However, Shaun's injuries from the beating still do not qualify as a "serious health condition," because he did not receive "[t]reatment two or more times" for those injuries. 29 C.F.R. § 825.114(a)(2)(i)(A). Shaun was treated only once at the emergency room, on August 6.

Plaintiff argues that Shaun was treated for his injuries from the assault on two more occasions, on August 9 by Lawler and on August 17 by Solomon. Neither of those episodes reasonably can be characterized as "treatment" of Shaun's injuries from the assault. "Treatment" is loosely defined in the Department of Labor's rules implementing the FMLA; under the relevant rules, "[t]reatment . . . includes (but is not limited to) examinations to determine if a serious health condition exists and evaluations of the condition" but does not include "routine physical examinations." 29 C.F.R. § 825.114(b). Lawler, a

counseling assistant, met with Shaun for a pre-arranged drug counseling session. He happened to ask Shaun about his black eye, but Shaun told him that he was fine and minimized the incident. There is no indication in the record that he and Shaun mentioned the incident again during the drug counseling session. Lawler's question does not amount to "examination" or "evaluation" of Shaun's injuries from the assault but, rather, was plainly a passing expression of curiosity and concern.

Solomon never met Shaun; he merely spoke to Shaun's mother on the phone, once, and wrote a letter on her behalf. There is no indication that Solomon had any specific information about Shaun's physical injuries. To the extent that Solomon remembers his conversation with Plaintiff or his motivation for writing the letter, it appears that he was concerned about treatment for Shaun's behavioral problems, not for his physical injuries.

There is no factual dispute about what Lawler and Solomon did. The question is whether, under the FMLA, their actions constituted "treatment" of Shaun's physical injuries from the assault. We conclude that they did not: Neither Lawler nor Solomon "examined" or "evaluated" Shaun's injuries or treated those injuries in any other manner. Accordingly, Shaun's injuries from the assault were not a "serious health condition" entitling Plaintiff to FMLA leave.

Next, we conclude that Shaun's psychological condition did not constitute a "serious health condition." Plaintiff asserts that Shaun's psychological problems amounted to a "chronic serious health condition" within

the meaning of 29 C.F.R. § 825.114(a)(2)(iii). That argument fails, because "chronic serious health conditions" must be accompanied by periods of incapacity. *Id.* Plaintiff asserts, without citation to the record, that Shaun's psychological condition caused episodic incapacity. However, there is no evidence whatsoever in the record that Shaun suffered any period of incapacity – inability to perform regular daily activities – as a result of his behavioral problems.

Finally, Plaintiff argues that "the combination of Shaun's physical and psychological condition rises to the level of a serious health condition." The point of that argument is to link the alleged period of incapacity from the assault with the continued course of treatment for Shaun's behavioral problems, thereby creating a "combined condition" that satisfies the requirements of the FMLA and the relevant administrative rules.

As authority for her "combined condition" argument, Plaintiff cites *Price v. City of Fort Wayne*, 117 F.3d 1022 (7th Cir.1997). In Price, the plaintiff simultaneously suffered from "an assemblage of [conditions] including elevated blood pressure, hyperthyroidism, back pain, severe headaches, sinusitis, infected cyst, sore throat, swelling throat, coughing and feelings of stress and depression." *Id.* at 1023. There was no dispute that the plaintiff was incapacitated by that combination of conditions or that she underwent continuing treatment: She saw her doctor eight times over the relevant two-month period and underwent a thyroid ultrasound, a needle biopsy, an excision of a mass, and a CT scan. *See id.* at 1024. Rather, the question was whether the plaintiff's conditions could be considered together for purposes of the FMLA, or

whether each of the conditions had to be considered separately to determine whether one, by itself, was a "serious health condition." *Id.* The court concluded that the conditions could be considered together and that a group of seemingly unrelated conditions that combine to incapacitate a person and to require continuing treatment can, together, constitute a "serious health condition." *Id.* at 1025.

The difficulty with applying the reasoning of Price here is that there is no competent evidence in the record to suggest that Shaun suffered from combined conditions that incapacitated him. Shaun received sporadic counseling beginning in 1991 and was assaulted in 1995, but there is nothing to suggest that Shaun ever was treated for a combination of physical and psychological symptoms, or that he was incapacitated by a combined condition. There simply is no basis in this record to conclude that Shaun's various behavioral and emotional problems ever "combined" with the passing physical effects of the assault to create a "serious health condition."

C. Leave to "Care For" a Child

Further, even if Plaintiff had created a factual dispute on the question whether Shaun had a combined physical and mental condition, or some other "serious health condition," she still would not be entitled to FMLA leave. As noted, the FMLA provides for leave to "care for" a child who has a serious health condition. The Department of Labor's rules provide some explanation about what it means to "care for" a person with a serious health condition. Those rules state, at 29 C.F.R. § 825.116(a), that the

FMLA "encompasses both physical and psychological care." The rule gives two examples of "caring for" a family member: (1) "[W]here . . . the family member is unable to care for his or her own basic medical, hygienic, or nutritional needs or safety, or is unable to transport himself or herself to the doctor"; and (2) "providing psychological comfort and reassurance which would be beneficial to a child, spouse or parent with a serious health condition who is receiving inpatient or home care." *Id.*

Plaintiff's asserted purpose in moving Shaun to the Philippines was to keep him safe from further beatings. She was not moving Shaun so that he could receive superior – or any – medical or psychological treatment. Indeed, Plaintiff had no specific plans to seek medical attention for Shaun when she reached the Philippines, and he did not see a doctor of any kind for more than five months after he moved overseas. Further, it is undisputed that there were no psychological services available within a three-hour drive of the rural area of the Philippines to which Plaintiff took Shaun.

Plaintiff's act of taking Shaun to a foreign country and leaving him with relatives – although motivated by an understandable concern for Shaun's safety – did not amount to "caring for" Shaun for purposes of the FMLA. The relevant administrative rule, 29 C.F.R. § 825.116, suggests that "caring for" a child with a "serious health condition" involves some level of participation in ongoing treatment of that condition. If, as Plaintiff suggests, Shaun was suffering from a serious mental and physical condition, then Plaintiff could not "care for" him under the FMLA by removing him to a place where he would

receive no treatment for either condition and leaving him there.

D. Estoppel and Waiver

Plaintiff also argues that Defendant is estopped from denying that Shaun had a "serious health condition." First, she argues that Defendant is estopped because it did not request a second medical certification regarding Shaun's condition after she provided it with Dr. Solomon's letter. When an employee requests FMLA leave to care for a relative, the employer "may require" that the request be accompanied by a certification from a health care provider. 29 U.S.C. § 2613(a). That certification must state (1) the date on which the serious health condition began, (2) the probable duration of that condition, (3) the medical facts regarding the condition, (4) a statement that the employee is needed to care for the relative, and (5) an estimate of the amount of time during which the employee will need to care for the relative. *See* 29 U.S.C. § 2613(b). If the employer is dissatisfied with the certification, it may require, at its own expense, second and third certifications. *See* 29 U.S.C. § 2613(c), (d).

In *Sims v. Alameda-Contra Costa Transit District*, 2 F.Supp.2d 1253, 1263 (N.D.Cal.1998), the district court concluded that, if an employer chooses to require a first certification, but does not choose to require a second certification, it is not entitled to challenge the "findings" in the first certification – specifically, the finding of a "serious health condition" – if the case ends up in court. Rather, the employer is bound by those findings. *See id.*

The parties debate the merits of Sims at length, but it is readily distinguishable. Sims involved a medical certification requested by the employer and provided by the employee. Here we have no proper certification. Dr. Solomon's letter did not satisfy the requirements for medical certification specified by 29 U.S.C. § 2163(a, b). In fact, it did not even establish or claim that Shaun had a serious medical condition. *See Sims*, 2 F.Supp.2d at 1263 ("AC Transit waived its right to litigate whether Sims had a serious medical condition only if Sims' initial certification was sufficient to establish that he had such a condition."). Plaintiff points to no provision of the FMLA itself, or of the relevant administrative rules, that even arguably estops Defendant from disputing the contents of the letter in such circumstances.

Second, Plaintiff argues that Defendant is estopped from denying that Shaun had a "serious health condition" because it did not provide her with written notice of her FMLA rights and obligations. However, as soon as Plaintiff made an FMLA claim, in March 1996, Defendant requested FMLA certification and mailed her the appropriate form.[4]

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[4] As noted, Plaintiff never provided a certification to Defendant. Nevertheless, an incomplete copy of the form is in the record. Dr. Rath filled it out in part, on June 24, 1996, and apparently returned it to Plaintiff's counsel. Rath had not treated Shaun since 1991 and based many of his conclusions in the form on what Plaintiff told him. In the form, Rath states that Shaun had a "serious health condition" during three periods: Beginning August 20, 1991, beginning February 16, 1995, and beginning January 25, 1996. Rath also states that the "probable duration of condition or need for medical treatment" was, in each case, six months. Accordingly, even Rath's partially

Plaintiff contends that Defendant should have known that her initial vacation request actually was a request for FMLA leave and provided her with written notice at that time. However, even if that were true, nothing in the statute or rules suggests that Defendant is estopped from arguing about Shaun's health. Rather, the result merely would be that Defendant could not argue that Plaintiff had failed to provide 30 days' notice of her need for FMLA leave, as required by the statute. Because Defendant is not arguing about Plaintiff's failure to provide notice, and the district court did not mention the 30 days' notice requirement in its order, Plaintiff's argument is beside the point.

Plaintiff next argues waiver. In her third and fourth claims for relief, Plaintiff alleged that Defendant failed to post notices of FMLA and CFRA rights in a conspicuous place. Plaintiff does not assign error to the district court's grant of summary judgment on those claims. However, on appeal she repeats her contention that notices were not posted and asserts that, as a result, Defendant "has waived its right to dispute" the question of Shaun's health.

The evidence in the summary judgment record does not support Plaintiff's factual contention. Her only

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completed medical certification form does not support Plaintiff's allegation that Shaun had a serious medical condition under the FMLA when she took him to the Philippines on August 17, 1995. The closest period during which Shaun suffered from such a condition, according to Rath, was the six-month period beginning February 16, 1995. That period ended on August 16, 1995, the day before Plaintiff and Shaun left for the Philippines.

evidence is her own declaration and the declaration of a co-worker, each of which states that the declarant did not see FMLA or CFRA notices. However, the record also contains an affidavit from the person who is responsible for posting FMLA and CFRA notices, stating that the required notices were posted on an office bulletin board, as well as statements from other employees who saw the notices. Plaintiff's evidence does not directly contradict the affidavit from the person who posted the notice and, thus, creates no issue of fact. Even if Plaintiff and her co-worker did not read the notices, the undisputed evidence in the record is that they were posted.

E. Wrongful Termination Claim

Finally, Plaintiff contends that she was wrongfully terminated in violation of California laws forbidding discrimination on the basis of sex. The basis for that contention is Plaintiff's assertion that Elaine Phelps discriminated against her because Plaintiff is a woman. As evidence of Phelps' sex-based discrimination, Plaintiff cites the following statement from a 1998 declaration by Plaintiff's co-worker Solane Louie: "Hermie Baron heard comments from Elaine Phelps, to the extent that 'The first thing I should do when I become lab manager is to fire Fe Marchisheck.' " In her declaration, Louie also reports that she heard Phelps say that Plaintiff was lazy, left work early, slept on the job, and came to work late.

Plaintiff acknowledges that she did not raise the issue of sex discrimination before the district court. However, she urges us to consider her claim anyway. We

decline to do so. Plaintiff has not presented any compelling reason why the normal preservation requirements should not apply in this case. She was in possession of substantially similar statements by Louie as early as 1995, which defeats her assertion that this is newly discovered evidence.

CONCLUSION

Plaintiff's desire to move her son to a more wholesome environment is laudable, and her further desire to do so promptly and at a reasonable cost is understandable. Nevertheless her predicament is not one that Congress protected through the FMLA nor one that the California legislature protected through the CFRA. Those statutes are designed to permit employees to take leaves for certain medical purposes only, and Plaintiff's leave was not for such a purpose.

The district court's grant of summary judgment to Defendant is

AFFIRMED.

ATTORNEY OR PARTY WITHOUT ATTORNEY (*Name and Address*):

TELEPHONE NO:
415/288-9800

[X] Recording requested by and return to:

A. Robert Singer, Esq./Arlene M. Rosen, Esq.
HASSARD BONNINGTON LLP
Two Embarcadero Center, Suite 1800
San Francisco, CA 94111-3993
[X] ATTORNEY FOR [X] JUDGMENT CREDITOR
[ ] ASSIGNEE OF RECORD

NAME OF COURT:	U.S. DISTRICT COURT Northern District of California
MAILING ADDRESS:	1301 Clay Street, #400 South
CITY AND ZIP CODE:	Oakland, California 94612-5212
PHONE NUMBER:	510/637-3559

PLAINTIFF:	Fe Castro Marchisheck
DEFENDANT:	San Mateo County

ABSTRACT OF JUDGMENT

CASE NUMBER:

C 96-4254 SBA

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1. The [X] judgment creditor [ ] assignee of record applied for an abstract of judgment and represents the following:

a. Judgment debtor's

Name and last known address

Fe Castro Marchisheck
1628 Noe Avenue
San Mateo, CA 94401

b. Driver's license no. & state: _____

[X] Unknown

c. Social Security no.: 074 40 5156

[ ] Unknown

d. Summons or notice of entry of sister-state judgment was personally served or mailed to (*name and address*):

Crisostomo G. Ibarra, Esq., 744 Montgomery St., Suite 120, San Francisco, California 94111

e. [ ] Additional judgment debtors are shown on reverse.

Date: 2/29/00

Arlene M. Rosen
(TYPE OR PRINT NAME)

/s/ Arlene M. Rosen
(SIGNATURE OF APPLICANT OR ATTORNEY)

---

2. a. [X] I certify that the following is a true and correct abstract of the judgment entered in this action.

b. [X] A certified copy of the judgment is attached.

3. Judgment creditor (*name*):

San Mateo County

whose address appears on this form above the court's name.

4. Judgment debtor (*full name as it appears in judgment*):

Fe Castro Marchisheck

5. a. Judgment entered on (*date*:) June 15, 1998

b. Renewal entered on (*date*:)

c. Renewal entered on (*date*:)

6. Total amount of judgment as entered or last renewed:

$5,727.00

7. [X] An [ ] execution [X] attachment lien

is endorsed on the judgment as follows:

a. Amount $ 5,727.00

b. in favor of (*name and address*):

San Mateo County
c/o A. Robert Singer, Esq.
HASSARD BONNINGTON LLP
Two Embarcadero Center
Suite 1800
San Francisco, CA 94111
ABSTRACT OF JUDGMENT

8. A stay of enforcement has

a. [X] has not been ordered by the court

b. [ ] been ordered by the court effective until (*date*):

9. [ ] This judgment is an installment judgment.

Clerk, by _____, Deputy

Date Issued _____

A. ROBERT SINGER, ESQ., State Bar No. 58993
MATTHEW D. MANDELBAUM, ESQ.,
State Bar No. 191420
Two Embarcadero Center, Suite 1800
San Francisco, California 9411-3993
Telephone: (415) 288-9800
Fax: (415) 288-9801

Attorneys for Defendant
COUNTY OF SAN MATEO

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

FE CASTRO MARCHISHECK, Plaintiff, vs. SAN MATEO COUNTY and DOES 1 through 10, Defendants.	No. C 96-4254 SBA ORDER GRANTING MOTION OF DEFENDANT, COUNTY OF SAN MATEO, FOR SUMMARY JUDGMENT (Filed Jun. 4, 1998)

The Motion of defendant, County of San Mateo, for Summary Judgment came on for hearing on April 21, 1998. Defendant appeared through its attorney, A. Robert Singer, Esq., of Hassard Bonnington LLP. Plaintiff appeared through her attorney, Cristostomo G. Ibarra, Esq.

After full consideration of the evidence submitted by the parties, this Court finds that there is no triable issue of material fact with regard to plaintiff's claims and causes of action, all of which are based upon the Family

and Medical Leave Act ("FMLA") and the California Family Rights Act ("CFRA"), and that defendant County of San Mateo is entitled to judgment as a matter of law on all of the claims since the undisputed evidence establishes that during the time period at issue in this case plaintiff's son, Shaun, did not have a serious medical condition which would allow plaintiff to claim the protections of the FMLA and the CFRA. Accordingly, with regard to plaintiff's claims under both statutes, no triable issue of material fact exists.

Accordingly:

IT IS ORDERED that the Motion of the County of San Mateo for Summary Judgment be, and it is hereby, granted that judgment be entered in favor of said defendant and against plaintiff Fe Castro Marchisheck.

Dated: June 3, 1998

/s/ Saundra B. Armstrong
JUDGE OF THE DISTRICT COURT

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

FE CASTRO MARCHISHECK, Plaintiff, vs. SAN MATEO COUNTY and DOES 1 through 10, Defendants.	No. C 96-4254 SBA JUDGMENT (Filed Jun. 18, 1998)

This action came on for hearing before the Court, on April 21, 1998, Hon. Saundra B. Armstrong, District Judge Presiding, on a Motion for Summary Judgment, and the evidence presented having been fully considered, the issues having been duly heard and the Order Granting Motion of Defendant, County of San Mateo, For Summary Judgment entered on June 4, 1998,

IT IS ORDERED AND ADJUDGED that the Plaintiff take noting, that the action be dismissed on the merits, and that Defendant, San Mateo County, recover its costs.

Dated: June 13, 1998

/s/ Saundra B. Armstrong
United States District Judge

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FE CASTRO MARCHISHECK, Plaintiff-Appellant, v. SAN MATEO COUNTY and DOES 1 through 10, Defendants-Appellees.	No. 98-16141 D.C. No. CV-96-04254-SBA ORDER (Filed Jan 12, 2000)

Before: CANBY, HALL, and GRABER, Circuit Judges.

Appellant's petition for rehearing is DENIED.

FMLA 29 U.S.C. § 2601 et seq.

§ 2601. Findings and purposes

(a) Findings

Congress finds that –

(1) the number of single-parent households and two-parent households in which the single parent or both parents work is increasing significantly;

(2) it is important for the development of children and the family unit that fathers and mothers be able to participate in early childrearing and the care of family members who have serious health conditions;

(3) the lack of employment policies to accommodate working parents can force individuals to choose between job security and parenting;

(4) there is inadequate job security for employees who have serious health conditions that prevent them from working for temporary periods;

(5) due to the nature of the roles of men and women in our society, the primary responsibility for family care-taking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men; and

(6) employment standards that apply to one gender only have serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender.

(b) Purposes

It is the purpose of this Act –

(1) to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity;

(2) to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition;

(3) to accomplish the purposes described in paragraphs (1) and (2) in a manner that accommodates the legitimate interests of employers;

(4) to accomplish the purposes described in paragraphs (1) and (2) in a manner that, consistent with the Equal Protection Clause of the Fourteenth Amendment, minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons, on a gender-neutral basis; and

(5) to promote the goal of equal employment opportunity for women and men, pursuant to such clause.

§ 2612. Leave requirement

(a) In general

(1) Entitlement to leave

Subject to section 2613 of this title, an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following:

(A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.

(B) Because of the placement of a son or daughter with the employee for adoption or foster care.

(C) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.

(D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

(2) Expiration of entitlement

The entitlement to leave under subparagraphs (A) and (B) of paragraph (1) for a birth or placement of a son or daughter shall expire at the end of the 12-month period beginning on the date of such birth or placement.

(b) Leave taken intermittently or on reduced leave schedule

(1) In general

Leave under subparagraph (A) or (B) of subsection (a)(1) of this section shall not be taken by an employee intermittently or on a reduced leave schedule unless the employee and the employer of the employee agree otherwise. Subject to paragraph (2), subsection (e)(2) of this section, and section 2613(b)(5) of this title, leave under subparagraph (C) or (D) of subsection (a)(1) of this section may be taken intermittently or on a reduced leave schedule when medically necessary. The taking of leave intermittently or on a reduced leave schedule pursuant to this paragraph shall not result in a reduction in the total amount of leave to which the employee is entitled under subsection (a) of this section beyond the amount of leave actually taken.

(2) Alternative position

If an employee requests intermittent leave, or leave on a reduced leave schedule, under subparagraph (C) or (D) of subsection (a)(1) of this section, that is foreseeable based on planned medical treatment, the employer may require such employee to transfer temporarily to an available alternative position offered by the employer for which the employee is qualified and that –

(A) has equivalent pay and benefits; and

(B) better accommodates recurring periods of leave than the regular employment position of the employee.

(c) Unpaid leave permitted

Except as provided in subsection (d) of this section, leave granted under subsection (a) may consist of unpaid leave. Where an employee is otherwise exempt under regulations issued by the Secretary pursuant to section 213(a)(1) of this title, the compliance of an employer with this subchapter by providing unpaid leave shall not affect the exempt status of the employee under such section.

(d) Relationship to paid leave

(1) Unpaid leave

If an employer provides paid leave for fewer than 12 workweeks, the additional weeks of leave necessary to attain the 12 workweeks of leave required under this subchapter may be provided without compensation.

(2) Substitution of paid leave

(A) In general

An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or family leave of the employee for leave provided under subparagraph (A), (B), or (C) of subsection (a)(1) of this section for any part of the 12-week period of such leave under such subsection.

(B) Serious health condition

An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or medical or sick leave of the

employee for leave provided under subparagraph (C) or (D) of subsection (a)(1) of this section for any part of the 12-week period of such leave under such subsection, except that nothing in this subchapter shall require an employer to provide paid sick leave or paid medical leave in any situation in which such employer would not normally provide any such paid leave.

(e) Foreseeable leave

(1) Requirement of notice

In any case in which the necessity for leave under subparagraph (A) or (B) of subsection (a)(1) of this section is foreseeable based on an expected birth or placement, the employee shall provide the employer with not less than 30 days' notice, before the date the leave is to begin, of the employee's intention to take leave under such subparagraph, except that if the date of the birth or placement requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable.

(2) Duties of employee

In any case in which the necessity for leave under subparagraph (C) or (D) of subsection (a)(1) of this section is foreseeable based on planned medical treatment, the employee –

(A) shall make a reasonable effort to schedule the treatment so as not to disrupt unduly the operations of the employer, subject to the approval of the health care provider of the employee or the health care provider of the son, daughter, spouse, or parent of the employee, as appropriate; and

(B) shall provide the employer with not less than 30 days' notice, before the date the leave is to begin, of the employee's intention to take leave under such subparagraph, except that if the date of the treatment requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable.

(f) Spouses employed by same employer

In any case in which a husband and wife entitled to leave under subsection (a) of this section are employed by the same employer, the aggregate number of workweeks of leave to which both may be entitled may be limited to 12 workweeks during any 12-month period, if such leave is taken –

(1) under subparagraph (A) or (B) of subsection (a)(1) of this section; or

(2) to care for a sick parent under subparagraph (C) of such subsection.

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§ 2613. Certification

(a) In general

An employer may require that a request for leave under subparagraph (C) or (D) of section 2612(a)(1) of this title be supported by a certification issued by the health care provider of the eligible employee or of the son, daughter, spouse, or parent of the employee, as

appropriate. The employee shall provide, in a timely manner, a copy of such certification to the employer.

(b) Sufficient certification

Certification provided under subsection (a) of this section shall be sufficient if it states –

(1) the date on which the serious health condition commenced;

(2) the probable duration of the condition;

(3) the appropriate medical facts within the knowledge of the health care provider regarding the condition;

(4)(A) for purposes of leave under section 2612(a)(1)(C) of this title, a statement that the eligible employee is needed to care for the son, daughter, spouse, or parent and an estimate of the amount of time that such employee is needed to care for the son, daughter, spouse, or parent; and

(B) for purposes of leave under section 2612(a)(1)(D) of this title, a statement that the employee is unable to perform the functions of the position of the employee;

(5) in the case of certification for intermittent leave, or leave on a reduced leave schedule, for planned medical treatment, the dates on which such treatment is expected to be given and the duration of such treatment;

(6) in the case of certification for intermittent leave, or leave on a reduced leave schedule, under section 2612(a)(1)(D) of this title, a statement of the medical necessity for the intermittent leave or leave

on a reduced leave schedule, and the expected duration of the intermittent leave or reduced leave schedule; and

(7) in the case of certification for intermittent leave, or leave on a reduced leave schedule, under section 2612(a)(1)(C) of this title, a statement that the employee's intermittent leave or leave on a reduced leave schedule is necessary for the care of the son, daughter, parent, or spouse who has a serious health condition, or will assist in their recovery, and the expected duration and schedule of the intermittent leave or reduced leave schedule.

(c) Second opinion

(1) In general

In any case in which the employer has reason to doubt the validity of the certification provided under subsection (a) of this section for leave under subparagraph (C) or (D) of section 2612(a)(1) of this title, the employer may require, at the expense of the employer, that the eligible employee obtain the opinion of a second health care provider designated or approved by the employer concerning any information certified under subsection (b) of this section for such leave.

(2) Limitation

A health care provider designated or approved under paragraph (1) shall not be employed on a regular basis by the employer.

(d) Resolution of conflicting opinions

(1) In general

In any case in which the second opinion described in subsection (c) of this section differs from the opinion in the original certification provided under subsection (a) of this section, the employer may require, at the expense of the employer, that the employee obtain the opinion of a third health care provider designated or approved jointly by the employer and the employee concerning the information certified under subsection (b) of this section.

(2) Finality

The opinion of the third health care provider concerning the information certified under subsection (b) of this section shall be considered to be final and shall be binding on the employer and the employee.

(e) Subsequent recertification

The employer may require that the eligible employee obtain subsequent recertifications on a reasonable basis.

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29 C.F.R. § 825.114 What is a "serious health condition" entitling an employee to FMLA leave?

(a) For purposes of FMLA, "serious health condition" entitling an employee to FMLA leave means an illness, injury, impairment, or physical or mental condition that involves:

(1) *Inpatient care* (*i.e.*, an overnight stay) in a hospital, hospice, or residential medical care facility, including any period of *incapacity* (for purposes of this section, defined to mean inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom), or any subsequent treatment in connection with such inpatient care; or

(2) *Continuing treatment* by a health care provider. A serious health condition involving continuing treatment by a health care provider includes any one or more of the following:

(i) A period of *incapacity* (*i.e.*, inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom) of more than three consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:

(A) Treatment two or more times by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health care services (*e.g.*, physical therapist) under orders of, or on referral by, a health care provider; or

(B) Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider.

(ii) Any period of incapacity due to pregnancy, or for prenatal care.

(iii) Any period of incapacity or treatment for such incapacity due to a chronic serious health condition. A chronic serious health condition is one which:

(A) Requires periodic visits for treatment by a health care provider, or by a nurse or physician's assistant under direct supervision of a health care provider;

(B) Continues over an extended period of time (including recurring episodes of a single underlying condition); and

(C) May cause episodic rather than a continuing period of incapacity (*e.g.*, asthma, diabetes, epilepsy, *etc.*).

(iv) A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective. The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider. Examples include Alzheimer's, a severe stroke, or the terminal stages of a disease.

(v) Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, either for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, *etc.*), severe arthritis (physical therapy), kidney disease (dialysis).

(b) Treatment for purposes of paragraph (a) of this section includes (but is not limited to) examinations to determine if a serious health condition exists and evaluations of the condition. Treatment does not include routine physical examinations, eye examinations, or dental examinations. Under paragraph (a)(2)(i)(B), a regimen of continuing treatment includes, for example, a course of prescription medication (*e.g.*, an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition (*e.g.*, oxygen). A regimen of continuing treatment that includes the taking of over-the-counter medications such as aspirin, antihistamines, or salves; or bedrest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to a health care provider, is not, by itself, sufficient to constitute a regimen of continuing treatment for purposes of FMLA leave.

(c) Conditions for which cosmetic treatments are administered (such as most treatments for acne or plastic surgery) are not "serious health conditions" unless inpatient hospital care is required or unless complications develop. Ordinarily, unless complications arise, the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches, other than migraine, routine dental or orthodontia problems, or periodontal disease, *etc.*, are examples of conditions that do not meet the definition of a serious health condition and do not qualify for FMLA leave. Restorative dental or plastic surgery after an injury or removal of dangerous growths are serious health conditions provided all the other conditions of this regulation are met, mental illness resulting from stress, or allergies may be serious health conditions, but only if all conditions of this section are met.

(d) Substance abuse may be a serious health condition if the conditions of this section are met. However, FMLA leave may only be taken for treatment for substance abuse by a health care provider or by a provider of health care services on referral by a health care provider. On the other hand, absence because of the employee's use of the substance, rather than for anger treatment, does not qualify for FMLA leave.

(e) Absence attributable to incapacity under paragraphs (a)(2)(ii) or (iii) qualify for FMLA leave even though the employee or the immediate family member does not receive treatment from a health care provider during the absence, and even if the absence does not last more than three days. For example, an employee with asthma may be unable to report to work due to the onset of an asthma attack or because the employee's health care provider has advised the employee to stay home when the pollen count exceeds certain levels in employee who is pregnant may be unable to report to work because of severe morning sickness.

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§ 825.116 What does it mean that an employee is "needed to care for" a family member?

(a) The medical certification provision that an employee is "needed to care for" a family member encompasses both physical and psychological care. It includes situations where, for example, because of a serious health condition, the family member is unable to

care for his or her own basic medical, hygienic, or nutritional needs or safety, or is unable to transport himself or herself to the doctor, etc. The term also includes providing psychological comfort and reassurance which would be beneficial to a child, spouse or parent with a serious health condition who is receiving inpatient or home care.

(b) The term also includes situations where the employee may be needed to fill in for others who are caring for the family member, or to make arrangements for changes in care, such as transfer to a nursing home.

(c) An employee's intermittent leave or a reduced leave schedule necessary to care for a family member includes not only a situation where the family member's condition itself is intermittent, but also where the employee is only needed intermittently – such as where other care is normally available, or care responsibilities are shared with another member of the family or a third party.

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§ 825.208 Under what circumstances may an employer designate leave, paid or unpaid, as FMLA leave and, as a result, count it against the employee's total FMLA leave entitlement?

(a) In all circumstances, it is the employer's responsibility to designate leave, paid or unpaid, as FMLA-qualifying, and to give notice of the designation to the employee as provided in this section. In the case of intermittent leave or leave on a reduced schedule, only one

such notice is required unless the circumstances regarding the leave have changed. The employer's designation decision must be based only on information received from the employee or the employee's spokesperson (*e.g.*, if the employee is incapacitated, the employee's spouse, adult child, parent, doctor, etc., may provide notice to the employer of the need to take FMLA leave). In any circumstance where the employer does not have sufficient information about the reason for an employee's use of paid leave, the employer should inquire further of the employee or the spokesperson to ascertain whether the paid leave is potentially FMLA-qualifying.

(1) An employee giving notice of the need for unpaid FMLA leave must explain the reasons for the needed leave so as to allow the employer to determine that the leave qualifies under the Act. If the employee fails to explain the reasons, leave may be denied. In many cases, in explaining the reasons for a request to use paid leave, especially when the need for the leave was unexpected or unforeseen, an employee will provide sufficient information for the employer to designate the paid leave as FMLA leave. An employee using accrued paid leave, especially vacation or personal leave, may in some cases not spontaneously explain the reasons or their plans for using their accrued leave.

(2) As noted in § 825.302(c), an employee giving notice of the need for unpaid FMLA leave does not need to expressly assert rights under the Act or even mention the FMLA to meet his or her obligation to provide notice, though the employee would need to state a qualifying reason for the needed leave. An employee requesting or notifying the employer of an intent to use accrued paid

leave, even if for a purpose covered by FMLA, would not need to assert such right either. However, if an employee requesting to use paid leave for an FMLA-qualifying purpose does not explain the reason for the leave – consistent with the employer's established policy or practice – and the employer denies the employee's request, the employee will need to provide sufficient information to establish an FMLA-qualifying reason for the needed leave so that the employer is aware of the employee's entitlement (i.e., that the leave may not be denied) and, then, may designate that the paid leave be appropriately counted against (substituted for) the employee's 12-week entitlement. Similarly, an employee using accrued paid vacation leave who seeks an extension of unpaid leave for an FMLA-qualifying purpose will need to state the reason. If this is due to an event which occurred during the period of paid leave, the employer may count the leave used after the FMLA-qualifying event against the employee's 12-week entitlement.

(b)(1) Once the employer has acquired knowledge that the leave is being taken for an FMLA required reason, the employer must promptly (within two business days absent extenuating circumstances) notify the employee that the paid leave is designated and will be counted as FMLA leave. If there is a dispute between an employer and an employee as to whether paid leave qualifies as FMLA leave, it should be resolved through discussions between the employee and the employer. Such discussions and the decision must be documented.

(2) The employer's notice to the employee that the leave has been designated as FMLA leave may be orally or in writing. If the notice is oral, it shall be confirmed in

writing, no later than the following payday (unless the payday is less than one week after the oral notice, in which case the notice must be no later than the subsequent payday). The written notice may be in any form, including a notation on the employee's pay stub.

(c) If the employer requires paid leave to be substituted for unpaid leave, or that paid leave taken under an existing leave plan be counted as FMLA leave, this decision must be made by the employer within two business days of the time the employee gives notice of the need for leave, or, where the employer does not initially have sufficient information to make a determination, when the employer determines that the leave qualifies as FMLA leave if this happens later. The employer's designation must be made before the leave starts, unless the employer does not have sufficient information as to the employee's reason for taking the leave until after the leave commenced. If the employer has the requisite knowledge to make a determination that the paid leave is for an FMLA reason at the time the employee either gives notice of the need for leave or commences leave and fails to designate the leave as FMLA leave (and so notify the employee in accordance with paragraph (b)), the employer may not designate leave as FMLA leave retroactively, and may designate only prospectively as of the date of notification to the employee of the designation. In such circumstances, the employee is subject to the full protections of the Act, but none of the absence preceding the notice to the employee of the designation may be counted against the employee's 12-week FMLA leave entitlement.

(d) If the employer learns that leave is for an FMLA purpose after leave has begun, such as when an employee

gives notice of the need for an extension of the paid leave with unpaid FMLA leave, the entire or some portion of the paid leave period may be retroactively counted as FMLA leave, to the extent that the leave period qualified as FMLA leave. For example, an employee is granted two weeks paid vacation leave for a skiing trip. In mid-week of the second week, the employee contacts the employer for an extension of leave as unpaid leave and advises that at the beginning of the second week of paid vacation leave the employee suffered a severe accident requiring hospitalization. The employer may notify the employee that both the extension and the second week of paid vacation leave (from the date of the injury) is designated as FMLA leave. On the other hand, when the employee takes sick leave that turns into a serious health condition (*e.g.*, bronchitis that turns into bronchial pneumonia) and the employee gives notice of the need for an extension of leave, the entire period of the serious health condition may be counted as FMLA leave.

(e) Employers may not designate leave as FMLA leave after the employee has returned to work with two exceptions:

(1) If the employee was absent for an FMLA reason and the employer did not learn the reason for the absence until the employee's return (*e.g.*, where the employee was absent for only a brief period), the employer may, upon the employee's return to work, promptly (within two business days of the employee's return to work) designate the leave retroactively with appropriate notice to the employee. If leave is taken for an FMLA reason but the employer was not aware of the reason, and the employee desires that the leave be counted as FMLA leave, the

employee must notify the employer within two business days of returning to work of the reason for the leave. In the absence of such timely notification by the employee, the employee may not subsequently assert FMLA protections for the absence.

(2) If the employer knows the reason for the leave but has not been able to confirm that the leave qualifies under FMLA, or where the employer has requested medical certification which has not yet been received or the parties are in the process of obtaining a second or third medical opinion, the employer should make a preliminary designation, and so notify the employee, at the time leave begins, or as soon as the reason for the leave becomes known. Upon receipt of the requisite information from the employee or of the medical certification which confirms the leave is for an FMLA reason, the preliminary designation becomes final. If the medical certifications fail to confirm that the reason for the absence was an FMLA reason, the employer must withdraw the designation (with written notice to the employee).

[60 FR 2237, Jan. 6, 1995; 60 FR 16383, Mar. 30, 1995]

§ 825.301 What other notices to employees are required of employers under the FMLA?

(a)(1) If an FMLA-covered employer has any eligible employees and has any written guidance to employees concerning employee benefits or leave rights, such as in an employee handbook, information concerning FMLA entitlements and employee obligations under the FMLA must be included in the handbook or other document. For example, if an employer provides an employee handbook to all employees that describes the employer's policies regarding leave, wages, attendance, and similar matters, the handbook must incorporate information on FMLA rights and responsibilities and the employer's policies regarding the FMLA. Informational publications describing the Act's provisions are available from local offices of the Wage and Hour Division and may be incorporated in such employer handbooks or written policies.

(2) If such an employer does not have written policies, manuals, or handbooks describing employee benefits and leave provisions, the employer shall provide written guidance to an employee concerning all the employee's rights and obligations under the FMLA. This notice shall be provided to employees each time notice is given pursuant to paragraph (b), and in accordance with the provisions of that paragraph. Employers may duplicate and provide the employee a copy of the FMLA Fact Sheet available from the nearest office of the Wage and Hour Division to provide such guidance.

(b)(1) The employer shall also provide the employee with written notice detailing the specific expectations and

obligations of the employee and explaining any consequences of a failure to meet these obligations. The written notice must be provided to the employee in a language in which the employee is literate (see § 825.300(c)). Such specific notice must include, as appropriate:

(i) that the leave will be counted against the employee's annual FMLA leave entitlement (see § 825.208);

(ii) any requirements for the employee to furnish medical certification of a serious health condition and the consequences of failing to do so (see § 825.305);

(iii) the employee's right to substitute paid leave and whether the employer will require the substitution of paid leave, and the conditions related to any substitution;

(iv) any requirement for the employee to make any premium payments to maintain health benefits and the arrangements for making such payments (see § 825.210), and the possible consequences of failure to make such payments on a timely basis (i.e., the circumstances under which coverage may lapse);

(v) any requirement for the employee to present a fitness-for-duty certificate to be restored to employment (see § 825.310);

(vi) the employee's status as a "key employee" and the potential consequence that restoration may be denied following FMLA leave, explaining the conditions required for such denial (see § 825.218);

(vii) the employee's right to restoration to the same or an equivalent job upon return from leave (see Secs. 825.214 and 825.604); and,

(viii) the employee's potential liability for payment of health insurance premiums paid by the employer during the employee's unpaid FMLA leave if the employee fails to return to work after taking FMLA leave (see § 825.213).

(2) The specific notice may include other information – *e.g.*, whether the employer will require periodic reports of the employee's status and intent to return to work, but is not required to do so. A prototype notice is contained in Appendix D of this part, or may be obtained from local offices of the Department of Labor's Wage and Hour Division, which employers may adapt for their use to meet these specific notice requirements.

(c) Except as provided in this subparagraph, the written notice required by paragraph (b) (and by subparagraph (a)(2) where applicable) must be provided to the employee no less often than the first time in each six-month period that an employee gives notice of the need for FMLA leave (if FMLA leave is taken during the six-month period). The notice shall be given within a reasonable time after notice of the need for leave is given by the employee – within one or two business days if feasible. If leave has already begun, the notice should be mailed to the employee's address of record.

(1) If the specific information provided by the notice changes with respect to a subsequent period of FMLA leave during the six-month period, the employer shall, within one or two business days of receipt of the employee's notice of need for leave, provide written

notice referencing the prior notice and setting forth any of the information in subparagraph (b) which has changed. For example, if the initial leave period were paid leave and the subsequent leave period would be unpaid leave, the employer may need to give notice of the arrangements for making premium payments.

(2)(i) Except as provided in subparagraph (ii), if the employer is requiring medical certification or a "fitness-for-duty" report, written notice of the requirement shall be given with respect to each employee notice of a need for leave.

(ii) Subsequent written notification shall *not* be required if the initial notice in the six-months period *and* the employer handbook or other written documents (if any) describing the employer's leave policies, clearly provided that certification or a "fitness-for-duty" report would be required (*e.g.*, by stating that certification would be required in all cases, by stating that certification would be required in all cases in which leave of more than a specified number of days is taken, or by stating that a "fitness-for-duty" report would be required in all cases for back injuries for employees in a certain occupation). Where subsequent written notice is not required, at least oral notice shall be provided. (See § 825.305(a).)

(d) Employers are also expected to responsively answer questions from employees concerning their rights and responsibilities under the FMLA.

(e) Employers furnishing FMLA-required notices to sensory impaired individuals must also comply with all applicable requirements under Federal or State law.

(f) If an employer fails to provide notice in accordance with the provisions of this section, the employer may not take action against an employee for failure to comply with any provision required to be set forth in the notice.

[60 FR 2237, Jan. 6, 1995; 60 FR 16383, Mar. 30, 1995]

§ 825.303 What are the requirements for an employee to furnish notice to an employer where the need for FMLA leave is not foreseeable?

(a) When the approximate timing of the need for leave is not foreseeable, an employee should give notice to the employer of the need for FMLA leave as soon as practicable under the facts and circumstances of the particular case. It is expected that an employee will give notice to the employer within no more than one or two working days of learning of the need for leave, except in extraordinary circumstances where such notice is not feasible. In the case of a medical emergency requiring leave because of an employee's own serious health condition or to care for a family member with a serious health condition, written advance notice pursuant to an employer's internal rules and procedures may not be required when FMLA leave is involved.

(b) The employee should provide notice to the employer either in person or by telephone, telegraph, facsimile ("fax") machine or other electronic means. Notice may be given by the employee's spokesperson (*e.g.*, spouse, adult family member or other responsible party) if the employee is unable to do so personally. The employee need not expressly assert rights under the

FMLA or even mention the FMLA, but may only state that leave is needed. The employer will be expected to obtain any additional required information through informal means. The employee or spokesperson will be expected to provide more information when it can readily be accomplished as a practical matter, taking into consideration the exigencies of the situation.

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§ 825.305 When must an employee provide medical certification to support FMLA leave?

(a) An employer may require that an employee's leave to care for the employee's seriously-ill spouse, son, daughter, or parent, or due to the employee's own serious health condition that makes the employee unable to perform one or more of the essential functions of the employee's position, be supported by a certification issued by the health care provider of the employee or the employee's ill family member. An employer must give notice of a requirement for medical certification each time a certification is required; such notice must be written notice whenever required by § 825.301. An employer's oral request to an employee to furnish any subsequent medical certification is sufficient.

(b) When the leave is foreseeable and at least 30 days notice has been provided, the employee should provide the medical certification before the leave begins. When this is not possible, the employee must provide the requested certification to the employer within the time frame requested by the employer (which must allow at

least 15 calendar days after the employer's request), unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts.

(c) In most cases, the employer should request that an employee furnish certification from a health care provider at the time the employee gives notice of the need for leave or within two business days thereafter, or, in the case of unforeseen leave, within two business days after the leave commences. The employer may request certification at some later date if the employer later has reason to question the appropriateness of the leave or its duration.

(d) At the time the employer requests certification, the employer must also advise an employee of the anticipated consequences of an employee's failure to provide adequate certification. The employer shall advise an employee whenever the employer finds a certification incomplete, and provide the employee a reasonable opportunity to cure any such deficiency.

(e) If the employer's sick or medical leave plan imposes medical certification requirements that are less stringent than the certification requirements of these regulations, and the employee or employer elects to substitute paid sick, vacation, personal or family leave for unpaid FMLA leave where authorized (see § 825.207), only the employer's less stringent sick leave certification requirements may be imposed.

§ 825.306 How much information may be required in medical certifications of a serious health condition?

(a) DOL has developed an optional form (Form WH-380, as revised) for employees' (or their family members') use in obtaining medical certification, including second and third opinions, from health care providers that meets FMLA's certification requirements. (See Appendix B to these regulations.) This optional form reflects certification requirements so as to permit the health care provider to furnish appropriate medical information within his or her knowledge.

(b) Form WH-380, as revised, or another form containing the same basic information, may be used by the employer; however, no additional information may be required. In all instances the information on the form must relate only to the serious health condition for which the current need for leave exists. The form identifies the health care provider and type of medical practice (including pertinent specialization, if any), makes maximum use of checklist entries for ease in completing the form, and contains required entries for:

(1) A certification as to which part of the definition of "serious health condition" (see § 825.114), if any, applies to the patient's condition, and the medical facts which support the certification, including a brief statement as to how the medical facts meet the criteria of the definition.

(2)(i) The approximate date the serious health condition commenced, and its probable duration, including the probable duration of the

patient's present incapacity (defined to mean inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom) if different.

(ii) Whether it will be necessary for the employee to take leave intermittently or to work on a reduced leave schedule basis (i.e., part-time) as a result of the serious health condition (see § 825.117 and § 825.203), and if so, the probable duration of such schedule.

(iii) If the condition is pregnancy or a chronic condition within the meaning of § 825.114(a)(2)(iii), whether the patient is presently incapacitated and the likely duration and frequency of episodes of incapacity.

(3)(i)(A) If additional treatments will be required for the condition, an estimate of the probable number of such treatments.

(B) If the patient's incapacity will be intermittent, or will require a reduced leave schedule, an estimate of the probable number and interval between such treatments, actual or estimated dates of treatment if known, and period required for recovery if any.

(ii) If any of the treatments referred to in subparagraph (i) will be provided by another provider of health services (e.g., physical therapist), the nature of the treatments.

(iii) If a regimen of continuing treatment by the patient is required under the supervision of the health care provider, a general description of the regimen (see § 825.114(b)).

(4) If medical leave is required for the employee's absence from work because of the employee's own condition (including absences due to pregnancy or a chronic condition), whether the employee:

(i) Is unable to perform work of any kind;

(ii) Is unable to perform any one or more of the essential functions of the employee's position, including a statement of the essential functions the employee is unable to perform (see § 825.115), based on either information provided on a statement from the employer of the essential functions of the position or, if not provided, discussion with the employee about the employee's job functions; or

(iii) Must be absent from work for treatment.

(5)(i) If leave is required to care for a family member of the employee with a serious health condition, whether the patient requires assistance for basic medical or personal needs or safety, or for transportation; or if not, whether the employee's presence to provide psychological comfort would be beneficial to the patient or assist in the patient's recovery. The employee is required to indicate on the form the care he or she will provide and an estimate of the time period.

(ii) If the employee's family member will need care only intermittently or on a reduced leave schedule basis (i.e., part-time), the probable duration of the need.

(c) If the employer's sick or medical leave plan requires less information to be furnished in medical certifications than the certification

requirements of these regulations, and the employee or employer elects to substitute paid sick, vacation, personal or family leave for unpaid FMLA leave where authorized (*see* § 825.207), only the employer's lesser sick leave certification requirements may be imposed.

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§ 825.307 What may an employer do if it questions the adequacy of a medical certification?

(a) If an employee submits a complete certification signed by the health care provider, the employer may not request additional information from the employee's health care provider. However, a health care provider representing the employer may contact the employee's health care provider, with the employee's permission, for purposes of clarification and authenticity of the medical certification.

(1) If an employee is on FMLA leave running concurrently with a workers' compensation absence, and the provisions of the workers' compensation statute permit the employer or the employer's representative to have direct contact with the employee's workers' compensation health care provider, the employer may follow the workers' compensation provisions.

(2) An employer who has reason to doubt the validity of a medical certification may require the employee to obtain a second opinion at the employer's expense. Pending receipt of the second (or third) medical opinion, the employee is provisionally entitled to the benefits of

the Act, including maintenance of group health benefits. If the certifications do not ultimately establish the employee's entitlement to FMLA leave, the leave shall not be designated as FMLA leave and may be treated as paid or unpaid leave under the employer's established leave policies. The employer is permitted to designate the health care provider to furnish the second opinion, but the selected health care provider may not be employed on a regular basis by the employer. See also paragraphs (e) and (f) of this section.

(b) The employer may not regularly contract with or otherwise regularly utilize the services of the health care provider furnishing the second opinion unless the employer is located in an area where access to health care is extremely limited (*e.g.*, a rural area where no more than one or two doctors practice in the relevant specialty in the vicinity).

(c) If the opinions of the employee's and the employer's designated health care providers differ, the employer may require the employee to obtain certification from a third health care provider, again at the employer's expense. This third opinion shall be final and binding. The third health care provider must be designated or approved jointly by the employer and the employee. The employer and the employee must each act in good faith to attempt to reach agreement on whom to select for the third opinion provider. If the employer does not attempt in good faith to reach agreement, the employer will be bound by the first certification. If the employee does not attempt in good faith to reach agreement, the employee will be bound by the second certification. For example, an employee who refuses to agree to

see a doctor in the specialty in question may be failing to act in good faith. On the other hand, an employer that refuses to agree to any doctor on a list of specialists in the appropriate field provided by the employee and whom the employee has not previously consulted may be failing to act in good faith.

(d) The employer is required to provide the employee with a copy of the second and third medical opinions, where applicable, upon request by the employee. Requested copies are to be provided within two business days unless extenuating circumstances prevent such action.

(e) If the employer requires the employee to obtain either a second or third opinion the employer must reimburse an employee or family member for any reasonable "out of pocket" travel expenses incurred to obtain the second and third medical opinions. The employer may not require the employee or family member to travel outside normal commuting distance for purposes of obtaining the second or third medical opinions except in very unusual circumstances.

(f) In circumstances when the employee or a family member is visiting in another country, or a family member resides in another country, and a serious health condition develops, the employer shall accept a medical certification as well as second and third opinions from a health care provider who practices in that country.

[60 FR 2237, Jan. 6, 1995; 60 FR 16383, Mar. 30, 1995]

§ 825.308 Under what circumstances may an employer request subsequent recertifications of medical conditions?

(a) For pregnancy, chronic, or permanent/long-term conditions under continuing supervision of a health care provider (as defined in § 825.114(a)(2)(ii), (iii) or (iv)), an employer may request recertification no more often than every 30 days and only in connection with an absence by the employee, unless:

(1) Circumstances described by the previous certification have changed significantly (e.g., the duration or frequency of absences, the severity of the condition, complications); or

(2) The employer receives information that casts doubt upon the employee's stated reason for the absence.

(b)(1) If the minimum duration of the period of incapacity specified on a certification furnished by the health care provider is more than 30 days, the employer may not request recertification until that minimum duration has passed unless one of the conditions set forth in paragraph (c)(1), (2) or (3) of this section is met.

(2) For FMLA leave taken intermittently or on a reduced leave schedule basis, the employer may not request recertification in less than the minimum period specified on the certification as necessary for such leave (including treatment) unless one of the conditions set forth in paragraph (c)(1), (2) or (3) of this section is met.

(c) For circumstances not covered by paragraphs (a) or (b) of this section, an employer may request recertification at any reasonable

interval, but not more often than every 30 days, unless:

(1) The employee requests an extension of leave;

(2) Circumstances described by the previous certification have changed significantly (e.g., the duration of the illness, the nature of the illness, complications); or

(3) The employer receives information that casts doubt upon the continuing validity of the certification.

(d) The employee must provide the requested recertification to the employer within the time frame requested by the employer (which must allow at least 15 calendar days after the employer's request), unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts.

(e) Any recertification requested by the employer shall be at the employee's expense unless the employer provides otherwise. No second or third opinion on recertification may be required.

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§ 825.311 What happens if an employee fails to satisfy the medical certification and/or recertification requirements?

(a) In the case of foreseeable leave, an employer may delay the taking of FMLA leave to an employee who fails to provide timely certification after being requested

by the employer to furnish such certification (i.e., within 15 calendar days, if practicable), until the required certification is provided.

(b) When the need for leave is not foreseeable, or in the case of recertification, an employee must provide certification (or recertification) within the time frame requested by the employer (which must allow at least 15 days after the employer's request) *or* as soon as reasonably possible under the particular facts and circumstances. In the case of a medical emergency, it may not be practicable for an employee to provide the required certification within 15 calendar days. If an employee fails to provide a medical certification within a reasonable time under the pertinent circumstances, the employer may delay the employee's continuation of FMLA leave. If the employee never produces the certification, the leave is not FMLA leave.

(c) When requested by the employer pursuant to a uniformly applied policy for similarly-situated employees, the employee must provide medical certification at the time the employee seeks reinstatement at the end of FMLA leave taken for the employee's serious health condition, that the employee is fit for duty and able to return to work (see § 825.310(a)) if the employer has provided the required notice (see § 825.301(c); the employer may delay restoration until the certification is provided. In this situation, unless the employee provides either a fitness-for-duty certification or a new medical certification for a serious health condition at the time FMLA leave is concluded, the employee may be terminated. See also § 825.213(a)(3).